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No. 87-739

In The
Supreme Court of the United States
October Term, 1987

BOAT NIAGARA FALLS, INC.,

Petitioner,

v.

FRANCISCO JOIA and
JO-JA SERVICE CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court below misinterpret the rule set forth in *Farrel Lines, Inc. v. Jones,* 530 F.2d 7 (5th Cir. 1976) Reh'g Denied, 532 F.2d 1375 (5th Cir. 1976) and in *Waterman S.S. Co. v. Gay Cottons,* 414 F.2d 724 (9th Cir. 1969)?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Argument	1
Conclusion	4

TABLE OF AUTHORITIES

Page

CASES

Farrell Lines, Inc. v. Jones, 530 F.2d 7 (5th Cir. 1976) ..... i, 2

Spencer Kellogg & Sons, Inc. v. Hicks, 285 U.S. 502, 52 S. Ct. 450, 76 L.Ed. 903 (1932) 2

States S.S. Co. v. United States, 259 F.2d 458 (9th Cir. 1951) cert. denied, 358 U.S. 933, 79 S. Ct. 316, 3 L.Ed.2d 305 (1959) 3

Waterman S.S. Co. v. Gay Cottons, 414 F.2d 724 (9th Cir. 1969) ..... i, 2

STATUTE INVOLVED

46 U.S.C. § 183 4

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ARGUMENT

Quoting the ARGENT 1940 AMC 508, 509 (S.D.N.Y. 1965) the Court below stated.

> "An owner cannot close its eyes to what prudent inspection would reveal. An owner must avail itself of whatever means of knowledge are reasonably neces-

sary to prevent conditions likely to cause losses. 'If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners would be at a premium.'" *Spencer-Kellogg & Sons, Inc. v. Hicks,* 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932); *Waterman S.S. Co. v. Gay Cottons,* 414 F.2d 724, 732 (9th Cir. 1969); *Farrell Lines, Inc. v. Jones,* 530 F.2d 7 (5th Cir. 1976).

The negligent act of the Master of the Waterboat CHIPPY was the inadvertent filling with water of the hydraulic oil fill pipe of the Fishing Vessel NIAGARA FALLS on the morning of August 1, 1983. This negligent act was performed by the Master of the CHIPPY, Michael Mahoney, sometime after 5:00 A.M. Upon realizing his error, Mahoney called his immediate superior Clifford Davignon who in turn contacted the sole stockholder of the defendant, Jo-Ja Service Corp. owner of the CHIPPY, Tommy Thomas about 7:00 A.M.

No officer or management employee had at this time observed the deck of the engine room of the NIAGARA FALLS for the simple reason that the engine room was locked.

The plaintiff Francisco Joia was the first to observe the condition existing in the engine room of the NIAGARA FALLS at about 9:00 A.M. Both plaintiff and Clifford Davignon returned to the NIAGARA FALLS where Clifford Davignon went about cleaning the engine room deck plates. The plaintiff informed Clifford Davignon that he had previously slipped and injured himself.

The Court below was correct in stating, "Undoubtedly, Thomas as well as high managerial personnel, Clifford Davignon, the managing agent of the waterboat, knew of

the pumping accident well before Francisco Joia suffered his injuries." This statement is uncontradicted but left unsaid is the more important fact that neither Clifford Davignon or Thomas knew of the condition of the deck plates in the engineroom of the NIAGARA FALLS as they were unable to observe the deck plates for the simple and obvious reason that the NIAGARA FALLS' engineroom was locked.

The Court below has mistakenly, it is submitted, confused the owner Thomas and management personnel, Clifford Davignon of the CHIPPY who sought to limit the liability as owner of the CHIPPY for the negligent act of its Master, Michael Mahoney, with the owners of the NIAGARA FALLS who did not petition the Court for Limitation of Liability.

The Court below relied on certain language employed in *States S.S. Co. v. United States*, 259 F.2d 458, 472 (9th Cir. 1957), *cert. den.* 358 U.S. 933, 79 S.Ct. 316, 3 L.Ed.2d 305 (1959).

[W]here the circumstances are such that the owners or managing agents, have a duty to act to see that the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to give the owner the benefit of the limitation act.

This language clearly refers to conditions aboard the shipowner's vessel. In other words, the shipowner who petitions to limit has a duty to act to see that his vessel is made seaworthy.

Here Mahoney promptly informed Davignon who relayed the message to Thomas. That message was that water had mistakenly been pumped into the hydraulic fill

line of the NIAGARA FALLS. None of the three men were aware of the condition in the engine room of the NIAGARA FALLS because the engine room was locked and inspection was not available.

The plaintiff himself was aware of the NIAGARA FALLS engine room condition before anyone else and upon discovery, immediately reported that condition to the owners of the NIAGARA FALLS. Any warning which could have been posted by Davignon would have been superfluous as the plaintiff was aware of the condition in the engine room of the NIAGARA FALLS before anyone else.

Jo-Ja submits that this is a fact situation specifically calling for the application of 46 USC § 183 as not being within the knowledge or privity of the vessel owner as the Trial Court correctly found after trial.

—o—

CONCLUSION

The respondent prays that the writ of Certiorari should properly be granted because the issue raised affects uniformity of maritime law in an industry where federal statutory and general maritime law control.

Respectfully submitted,

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APPENDIX

§ 183. *Amount of liability*

(a) *Privity or knowledge of owner; limitation.* The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) *Seagoing vessels; losses not covered in full.* In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portions of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $430 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) *Tonnage of seagoing vessels.* For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of

engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage. Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) *Loss of life or bodily injury arising on distinct occasions.* The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) *Privity imputed to owner.* In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) *"Seagoing vessel" defined.* As used in subsections (b), (c), (d), and (e) of this section and in section 4283A [46 USCS Appx § 183b], the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels of their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 4289 of this chapter, as amended [46 USCS Appx § 188].

(R. S. § 4283; Aug. 29, 1935, ch 804, § 1, 49 Stat. 960; June 5, 1936, ch 521, § 1, 49 Stat. 1479; Oct. 19, 1984, P. L. 98-498, Title II, Subtitle A, § 213(a), 98 Stat. 2306.)